No. 16,455

United States Court of Appeals

For the Ninth Circuit

LUCY K. COHEN,
Appellant,

vs.

WESTERN HOTELS, INC., and
E. B. DEGOLIA,
Appellees.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S REPLY BRIEF.

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Cases

Rules

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I.

Two points made in appellant's opening brief have not been answered by appellees and appear conceded:

A. That it was improper to permit appellees' witness Hoffer to testify that at the time of trial the rug was "in good shape" [R. 183]. It will be recalled that our expert witness, when asked a similar question for a proper purpose, was not allowed to answer. At that time the trial judge stated that appellant was "not entitled to have the witness say anything at all

about what the condition is today" [R. 72]. However, our objection to appellees' like question on direct examination of their own witness was overruled. The trial judge followed this ruling with a highly prejudicial speech to the jury, in which he said:

> "Now, I would like the jury to understand the basis of my ruling. The basis of my ruling is that, if that is the same rug and it is now in good shape, the fair inference can be drawn that at the time of the accident it was in good shape" [R. 184].

Compare this with the court's statement to appellant's counsel about the same question asked of her witness:

> ". . . if you are going to ask him to say that was a terribly dangerous situation or a dangerous situation, I am not going to let you do that . . . Telling us what the conditions are up there today or were yesterday or were at any time, except the morning of the accident, is immaterial" [R. 74].

The material prejudice to appellant from this inconsistency, acutely compounded by the trial judge's quoted remarks to the jury, is apparent. See our opening brief at pages 25-28.

B. That the trial judge engaged in conduct highly prejudicial to appellant's case. One instance of such conduct has just been quoted. Others have been set forth in our opening brief at pages 30-31. About all that appellees have to say about the matter is that they found four rulings on objections in appel-

lant's favor (Appellees' Br. 8) and that a particular rebuke by the court to appellant's counsel, discussed in our opening brief, was "mild" (Appellees' Br. 9). There was nothing mild about it. Appellant had made a thoroughly valid objection to a highly inflammatory statement by appellees' counsel, and for this her attorney was reprimanded by the judge in the presence of the jury: "we don't tolerate that kind of argument" [R. 107]. A full reading of the record will make it apparent that the trial judge did in fact interfere frequently in a belittling and deprecating way with appellant's case.

II.

Appellees are wrong when they state (Br. 31) that we failed to object to the amendment of their pleadings just before the end of the trial. Our objection was plain and clear: We had no time to prepare to meet the new issue [R. 176, 200].

The only other comment which appellees make on this point is that "appellant was not prejudiced in any way by the amendment." They state in their brief (p. 31) that the defendant DeGolia "is, of course, solvent"—a matter not reflected by the record. As a matter of fact, appellees' counsel argued at length to the jury about the unfairness of prosecuting this case against helpless Mr. DeGolia, confined for many years in a hospital [R. 175]. This particular departure into obscurantism would not have been possible if Western Hotels, Inc. had been kept in the case.

III.

In our opening brief we claimed prejudicial error in the trial judge's failure to strike volunteered testimony of appellees' witness Hoffer (not an expert) on how a rug such as the one in suit should properly be laid on the floor [R. 179]. The same type of question was repeatedly excluded when appellant asked it of her expert [e.g., R. 91]. The inconsistent rulings are, of course, severely prejudicial.

Appellees' answer is that Hoffer's testimony was not expert testimony, *i.e.,* opinion testimony, but was merely irrelevant; they say that appellant made the wrong objection.

It is apparent, however, that Hoffer testified in detail as to why and how a rug should properly be placed as this one was, i.e., what would be the consequences of laying the rug in this fashion or in some other fashion. This is precisely the question of "how the rug should be properly laid" [objection, R. 179], which was the main subject of the court's ruling against admission of expert testimony during appellant's case [R. 71, 73, 91-92]. Contrary to appellees' position, the vice in the volunteered answer was that it called for an opinion as to whether and why the rug was properly placed. This was no problem of relevance. Appellees were permitted to develop their theory of proper rug installation, while appellant was precluded from showing why or how the rug placement was improper.

IV.

On the question whether appellant was erroneously precluded from introducing expert testimony, appellees devote the bulk of their brief to distinguishing some of our cases on the basis that they involved appeals in bench trials, from nonsuits, in cases where the admission rather than the exclusion of expert testimony was under attack, and the like. We had thought that the governing rule of law as to admissibility of expert testimony was the same in all such cases, and in a jury trial as well. The basic rules seem fairly clear, and both sides appear to be in agreement on them:

(1) "It is for the trial court *in the exercise of a sound discretion* to determine whether expert testimony is appropriate under the particular circumstances of the case," *Duff v. Page*, 249 F. 2d 137, 140; Appellees' Br. 12 (emphasis supplied). See also *Oakes v. Chapman,* 158 Cal. App. 2d 78, 82 (1958); Appellees' Br. 25; App. Br. 18.

(2) But the discretion of the trial judge *must* be exercised according to *"correct legal standards"*. *Bratt v. Western Airlines,* 155 F. 2d 850 (10th Cir. 1946) (emphasis supplied). It is for the appellate court to determine whether the correct legal standards governed the trial judge's use of his discretion, *ibid.* And in proper cases the application of the wrong legal standard requires reversal. See App. Br. 21-22 and compare Appellees' Br. 15.

(3) It is not a sound objection that the witness may express an opinion on the ultimate issue in the case if that issue is such that expert testimony can enlighten the jurors (see Appellees' Br. 20; App. Br. 20-21).

(4) Readily observable matters within the understanding of the ordinary juryman are not subjects for expert testimony (Appellees' Br. 20).

(5) If the evidence, expert or otherwise, is admissible either under California State law or under Federal law, it is the duty of the trial judge to admit it, and error to exclude it. (Rule 43(a), F.R.C.P.; Appellees' Br. 10; App. Br. 12-14.)

The foregoing rules cover the subject and are not disputed between the parties. The question remains:

Did the judge correctly apply a proper legal standard in excluding appellant's expert testimony?

We submit that appellees' brief does not come to grips with this question. It is a recital of other situations in which expert testimony has or has not been admitted, but there is no analysis of what these cases mean to the present issue. But each case stands on its own facts; the only rug case found by either party stands for the proposition that the placement of rugs is a proper subject for expert testimony because it is not within the experience of the ordinary juryman. Failure to permit an expert to testify on the placement of rugs was there held to be reversible error. *Ordway v. Hilliard,* 266 App. Div. 1056, 44

N.Y.S. 2d 819 (1943). The bulk of appellees' cases are sidewalk cases, and we submit that they are not pertinent. There is a great difference between a permanent sidewalk made of concrete, which either has some noticeable defect or does not, and a large rug (this one was 11′ x 31′ [R. 178]) loosely placed across the floor of a hotel lobby, where countless people pass through and where the proprietor owes a special duty of care to his business invitees. *Laird v. T. W. Mather, Inc.,* 51 Cal. 2d 210 (1958). The special considerations of safety involved in the placement of a movable, loosely installed floor covering in such a public business place have no relation to the placement of rugs in a home, for instance, which would be the limit of the average juryman's familiarity with this kind of situation. The public has no such experience with providing a proper floor covering for a hotel lobby as it has with rises and falls in sidewalks.

Appellees' brief is noticeably weak on the trial court's principal error on the question of expert testimony: They state at length that there are Federal cases in which expert testimony has been excluded rather stringently, and to prove their point they analyze cases decided in 1877, 1891, 1915 and 1934 (Appellees' Br. 17, 18). Ignoring the expanding pattern of the law since 1877 and 1934, appellees make only a minimum argument that, under *California* standards of admissibility, the trial judge's ruling was correct. Apart from a discussion of general principles, appellees deal only very briefly with alleged California rulings excluding expert testimony (Appellees' Br. 26-

27), and these cases do not stand for appellees' propositions: In *Baccus v. Kroger,* 120 Cal. App. 2d 802 (1953), a permanent sidewalk installation was involved. The appellate court stated that experts were not needed in this case because "The dangerous condition sticks out like a sore thumb" (p. 804). In *Blinkinsop v. Weber,* 85 C.A. 2d 276 (1948), the opinion states (p. 283): "The opinion of the witness as to whether the steps were built in accordance with standard and accepted construction and architectural practice should have been received." In *McStay v. Citizens National T. & S. Bank,* 5 C.A. 2d 595 (1935), the court stated (p. 601) that the experts should be allowed to testify about "not only the facts but the conclusions to which they lead" because "[t]he scientific or customary construction of the steps or stairways in hotel buildings was not a matter within common knowledge".

Accordingly, appellees' attempt to show that the expert testimony would not have been admissible under California law has actually succeeded in showing the opposite—there is little doubt that under California law the evidence would have been received. The trial judge, in effect, concurred when he stated [R. 68]:

> "If you were in a State court, you might persuade me, but you are not."

It is astounding that at this late date an experienced United States District Judge should *refuse to consider* whether evidence is admissible under the State law of the forum, even though his attention was

specifically and explicitly drawn to the provisions of Rule 43(a), F.R.C.P. [see R. 68, 69]. Notably, appellees' brief in effect concedes that the trial judge was in error as a matter of law in not considering the problem in the light of the California rule (Appellees' Br. 10). This seems to be exactly the situation where the trial judge's discretion should be reviewed and the case reversed because of his failure to apply correct legal standards to it. *Bratt v. Western Airlines, supra.*

If appellant had merely shown that she had fallen on the rug, she would, of course, not be entitled to recover. She had to show some negligent conduct on the part of appellees, and she attempted to show two elements of negligence: appellees' knowledge of the rug's tendency to slip, without sufficient corrective action [R. 46-47], and incorrect installation in such a way that a tendency to slippage would result [R. 71].

The latter point is not a subject on which laymen would have any competent knowledge at all, and obviously no testimony other than expert testimony would ever be available to lay a foundation for submitting this theory of negligence to the jury.

When the trial court excluded appellant's expert testimony, it left her claim of negligent installation without any evidentiary support. At the conclusion of the case, all the jury really knew was that the rug had long had some tendency to slip and bunch up [R. 46-47]. As to whether there was something careless or negligent in the way this rug was laid, so as

to generate that tendency to slip, the jury were not enlightened. Would the members of this court, or any other laymen, have any meaningful knowledge on why some large rugs in public places tend to slip while others do not? We submit that only through the help of expert testimony could this part of the case, a very real part of it, be understood by lay persons on the jury.

V.

We urge again that the charge given the jury was inadequate. Appellees' brief talks of "argumentative instructions", of "ipsissima verba", and of "juridical catechism" (pp. 32, 33). We asked for nothing of this sort. It is the law of California where this accident occurred, that pedestrians do not have to look out for unanticipated danger, that even failure to observe an obvious danger may be excused, and that it is not contributory negligence to assume that one's way is clear. *E.g., Laird v. T. W. Mather, Inc.* 51 C. 2d 210 (1958). Since appellees raised the issue of appellant's contributory negligence, the jury certainly should have been instructed that her failure to notice the snare in the edge of the rug, or her failure to be on the lookout for it, could not be contributory negligence on Mrs. Cohen's part. There is nothing argumentative or hypothetical about this: It was a very real factor in the case.

CONCLUSION.

We submit that the appellant has not had a fair trial and is still entitled to one. For that purpose, the judgment should be reversed and a new trial ordered.

Dated, December 28, 1959.

Respectfully submitted,

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